Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

LARRY BARNES, SR., M.D.
Petitioner
vs
LOWE'S COMPANIES, INC.
Respondent

On Petition For Writ of Certiorari
To the United States Court of Appeal for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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2688

QUESTIONS PRESENTED

1. Whether it is unconstitutional for a retail merchant engaged in multi-state public commerce to use racial profiling as a criterion for theft prevention?

2. Whether racial profiling by a retail merchant engaged in multi-state public commerce constitutes ex ante racial discrimination and is this form of discrimination?

3. Whether a retail merchant engaged in multi-state public commerce enjoys absolute immunity from civil action under Title II of the Civil Rights Act of 1964?

4. Does the racial profiling of African Americans by a retail merchant constitute "badges and incidents of slavery" proposed by the United States Supreme Court decision in *Jones v. Mayer?* Does the racial profiling constitute intentional discrimination?

5. Whether a District Court Judge may use his broad discretion to dismiss a case before the facts of the case are determined when those facts determine federal jurisdiction?

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OPINIONS

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the Eastern District of North Carolina as case no. 98-1878. The case is unpublished and the Opinion is attached hereto as Appendix A.

The opinion of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc which is unpublished as case no. 98-1878. The Court opinion is hereto attached as Appendix C.

The judgment on decision by the United States District Court for the Eastern District of North Carolina unpublished as case no. Ca-97-1040-5-BO. The Order is hereto attached as Appendix B.

JURISDICTION

The petitioner seeks a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the Eastern District of North Carolina. The date that the United States Court of Appeals decided my case was August 26, 1998.

A timely petition for rehearing and suggestion for rehearing en banc was denied on October 19,1998, and an order denying rehearing which appears as Appendix C.

The jurisdiction of this case is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

On December 30, 1995, the Petitioner who is a middle aged African American Physician, went to the Lowe's Home Improvement Warehouse located at 4601 Capital Boulevard in Raleigh, North Carolina. The purpose of this shopping excursion was to purchase a replacement water filter cartridge for a water filtration unit that had been purchased at the Lowe's Home Improvement Warehouse previously. The Petitioner was accompanied on this trip by his sixteen year old son who decided to remain in the car since the Petitioner was suppose to pick up one item and quickly return home. The specific item in question was a Teledyne cartridge with Lowe's item number 25694 with a purchase price of $5.96. The Petitioner left his son in the car, telling the son that he would be back in less than five minutes. The Petitioner went into the retail establishment with the clear intent of purchasing merchandise which Lowe's offered for sale. At the time the Petitioner entered the Lowe's Home Improvement Warehouse, he had adequate financial resources on his person for the intended item of purchase. At the time the petitioner entered the retail establishment, he had the following assets on his person: $2,500.00 cash (U.S. Currency), credit cards with purchasing power of $30,000.00, and a credit card issued by Lowe's with a credit line of $4,000.00. Hence, the Petitioner entered the establishment with purchasing power of $36,500.00 to purchase a $5.96 item.

After entering the retail establishment, the Petitioner asked a Lowe's Sales Associate where he might find the item in question. The Lowe's Sales Associate directed the Petitioner to the aisle where desired item was located. After locating the desired item, the Petitioner placed the

item in his hand and proceeded towards the checkout area. However on the way to the front of the store, the Petitioner noticed that Lowe's was having a clearance on computers and related items. Noting what appeared to be a number of good buys, the Petitioner began picking up items for purchase and soon had more items than he could carry in his hands. At this point, the Petitioner realized that he needed a shopping cart or some way to carry the numerous items that he had planned to purchase. The Petitioner saw an unattended shopping cart in the middle of the store with trash paper and cardboard in the bottom. The Petitioner asked a Lowe's Sales Associate for permission to use the abandoned cart and was given permission and assistance in loading the items into the cart. After loading the items into the shopping cart, the Petitioner continued to browse and shop in the clearance area. Many of the items did not have posted prices, the Petitioner again solicited the assistance of a Lowe's Sales Associates. After doing several price checks, the Lowe's Sales Associate helped the Petitioner load several of the bulkier items into the cart. Having second thoughts, the Petitioner decided not to purchase the larger more expensive items but did keep a dozen or so smaller items. The Petitioner proceeded to the checkout counter with the merchandise he had planned to purchase. The Petitioner placed each item on the counter. The items were checked and bagged by the clerk. After receiving payment, the clerk put the transparent bags into the same cart that the Petitioner had used to transport the items to the checkout counter. The Petitioner was given a receipt and proceeded to push the shopping cart through the store exit uneventfully. After leaving the store and while pushing the shopping cart across the parking lot in route to his car, the Petitioner was chased and stopped by a Lowe's Theft Prevention Officer. This Lowe's Theft Prevention Officer aggressively and brazenly approached the Petitioner and accused the Petitioner of **SHOPLIFTING**. Outside of the store in the parking lot, Lowe's Theft Prevention Officer began searching the shopping cart and parcels in a ravenous fashion. The Lowe's Theft

Prevention Officer performed a strip search of parcels and the shopping cart, throwing trash out of the cart and going through each bag demanding to see receipts. This indignity caught the Petitioner completely off guard, in that the Petitioner had not stolen nor conspired to steal any item or items from the Lowe's Home Improvement Warehouse. The Petitioner has no criminal background and is not a thief! This entire abominable episode took place in an open parking lot in view of dozens of witnesses. Because of this disgusting event's rapidity and inhumanity, it took the Petitioner several minutes to get his bearing in this situation. After compliance with all of the Lowe's Theft Prevention Officer's requests and determining that the Petitioner did not steal anything, there was **not** an apology given for this outrageous, humiliating, and defaming conduct by the Lowe's employee. While in the parking lot after this episode, the petitioner, who is normally a pacifist, became angry and verbally rebuffed the Lowe's Theft Prevention Officer. The speech used by the Petitioner was neither blasphemous or would it be considered obscene by the standards of the United States Supreme Court.

The Petitioner followed the Lowe's Theft Prevention Officer back into the store to make an inquiry. The Lowe's Theft Prevention Officer had not given the Petitioner his name. The Petitioner approached the customer service counter in a gentlemanly manner but in severe emotional distress. The Petitioner was given the name of the Theft Prevention Officer involved and the address of Lowe's corporate offices to which he could address his indignation at being publicly humiliated, defamed, and dehumanized. Store personnel supplied all the information requested, including the name of the company president. The entire exchange inside of the store was uneventful. There was no threat of a lawsuit and the Petitioner did not receive an apology from the manager.

As the Petitioner left the store, the event was made more obvious by a comment made by a young African American male Lowe's employee. He had witnessed this atrocity and wished to remain anony-

mous for fear of loss of employment. His comments were: "man they dissed (disrespected) you; they gave you nigger treatment, but I need this job." In addition, other White witnesses commented on the outrageous and obviously racially motivated actions of the Lowe's Theft Prevention Officer. The White witnesses were confounded as to why the Petitioner was stopped and searched when they were not. In that the White witnesses walked out of the store with merchandise in their bare hands without any visible receipts compared to the Petitioner who had his merchandise in bags in a shopping Cart. This incident was so "extreme and outrageous" that it stirred the **"conscious"** and **"morality"**of the White witnesses. The mere fact that conservative White males would convey to the Petitioner their observation of this maltreatment, is illustrative of the "outrageousness" of the Lowe's Theft Prevention Officer's actions. Upon returning to the Petitioner'car, his son inquired as to why it took so long? An explanation was given to the Petitioner's son who became upset. The Petitioner returned home with elevated blood pressure, chest and epigastric pain.

After two years of requesting an apology from Lowe's and finally receiving a response from Lowe's corporate office which stated that the treatment which the Petitioner received was appropriate, a civil action was filed in United States District Court on December 30, 1997. The case was dismissed without Pretrial Discovery on May 14,1998. The decision of the District Court was affirmed in the Court of Appeals August 26, 1998, and a request for rehearing was denied on October 19, 1998.

REASONS FOR GRANTING THE WRIT

The Petitioner, Larry Barnes, Sr., petitions the Supreme Court of the United States pursuant to 28 U.S.C. 1254(1) to grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The Petitioner has no other adequate means to obtain the relief he seeks absent an adjudication of the constitutional validity of racial profiling by retail merchants.

Under the Civil Rights Act of 1964, the Justice Department can obtain injunctions ordering restaurant, hotels, theaters, and other places of public accommodations not to discriminate; not included are retail establishments. In recent court rulings, the courts state that: "... The clear indication is that Congress did not intend to include retail establishments." *Priddy v. Shopko Corporation*, 918 F. Supp 358, 359 (D. Ut. 1995).

Private retail establishments have abused what appears to be omission on the part of Congress to carry out clearly unconstitutional and intentional acts of racial discrimination through racial profiling its African Americans customers. Lowe's, Inc surreptitiously uses this technique in its theft prevention program.

This issue is in urgent need of review by the Court. Retail Merchants where not specifically included in Title II of the Civil Rights Act of 1964. As a result, they have enjoyed immunity from prosecution under these laws. As in the instant case where a large national corporation, Lowe's, Inc, victimized the Petitioner by subjecting him to its system of racial profiling as a tool for theft prevention.

The issue of racial profiling is widespread both in the public and private sector. Cases involving governmental sponsored racial profil-

ing and discrimination can be dealt with expediently by the Courts because of provisions in the Fourth, Thirteenth, and Fourteenth Amendment to the Constitution. The Maryland Court of Appeals ruled that state police could not use racial profiles as a cause to search vehicles of African Americans. *Wilkins v. Maryland State Police* (Civ. No. MJG-93-468 USDC MD). Since the above Constitutional provisions cannot be readily applied in private civil actions, current federal laws have not served as a deterrent for acts of retail racial discrimination and criminal profiling of African Americans. Consistent with the private search doctrine, it has been generally held that private security personnel are not subject to fourth Amendment constraints as long as they do not go beyond protecting the interest of their employer. *United States v. Francoeur*, 547 F.2d 891 (5th Cir. 1977); *People v. Zeliniski*, 155 Cal. Rptr.575, 594 P.2d 1000(1979).

Racial profiling is not a specific policy; it is a concept. It is a widespread discriminatory practice of stereotyping and projecting criminal inferences onto African Americans. Racial profiling of African American projects a dehumanizing image of increased criminal mischief and an indicia of suspiciousness about the Black race. This invasive practice vilifies African Americans, as in the case of this Petitioner in which the retailer (Lowe's, Inc) in which he was chosen unfairly as a likely suspect. It would be assumed the retail organizations might decide on the basis of "good corporate citizenship" or "good faith" not to profile African Americans or at least apply controls to ensure that the procedure would be fair and non-discriminatory. They have not done this because as in the instant case, Lowe's, Inc is aware that existing laws and statutes do not prohibit this practice by retailers. Hence, there is no peer review of a retailer's practice of racial profiling since it is conducted outside of public, legislative, and statutory monitoring. As it stands at the present time, private retailers are free to practice, develop, and practice any racial profiling method as they desire without any

mechanism to preserve the individual rights and civil liberties of their victims who are usually African Americans.

Racial profiling of African American constitute ex ante discrimination and guilt prediction. Retailers tend to be proactive identifying African Americans as potential offenders before they commit an offence. These actions are contrary to American Jurisprudence since they cause an inversion of the onus of proof; the onus of proof has traditionally been on the accuser. Racial profiling places the onus of proof on the accused as with the Petitioner in the instant case. This reversal of the onus of proof in alleged criminal actions which results from racial profiling is unconstitutional and is denial of due process. When a person is charged with a criminal act there must be a "Presumption of innocence". *Taylor v. Kentucky* ,436 U.S. 478 S.Ct. 1930, 56 L.Ed.2d (1978); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *Patternson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977);

The practice of racial profiling to prevent shoplifting by Lowe's, Inc and other private retail merchants represents a racially motivated conduct intended to discriminate against African Americans. In the instant case Lowe's, Inc has no practice of profiling White customers proactive to identify potential offenders. In dealing with White customer at Lowe's, there is no surreptitious judgmental valuations. In this case, there are specific facts which show an intent on the part of Lowe's Inc. to discriminate based upon race. In this instance, the evidence at hand including the selective action taken against the Petitioner and its verification by both Black and White witnesses makes the case valid. The Petitioners claims under Sections 1981 and 1982 are valid. *Odum v. Columbia University*, 906 F. Supp. 188, 194 (S.D.N.Y. 1995); Davis v. Frapolly, 747 F. Supp. 451, 453 (N.D. Ill. 1989).

Racial profiling of the Petitioner by Lowe's Inc. directly resulted in violations of the Petitioner's civil rights under the Thirteenth and Fourteenth Amendments to the United States Constitution, Civil Rights

Act of 1866, Civil Rights Act of 1871, and U.S.C.secs. 1981,1982,1983,
1985. This instant case was improperly and prematurely dismissed by the District Court before facts of the case were determined without pretrial discovery. The Court of Appeals affirmation of the unjustly dismissal by the Court denied due process and equal protection to the Petitioner for his federal torts. The premature dismissal by the District Court and affirmation by the Court of Appeals denied the Petitioner fundamental fairness and substantial justice. *People v. Jacobs,* 27 Cal.App.3d 246, 103 Cal.Rptr. 536, 543; 14th Amendment. *Dorsey v. Solomon,* D.C.Md. 435 F.Supp. 725, 733.

The affirmation of the District Court's dismissal of the case by the Court of appeals severely limited the rights of the Petitioner (an individual) and extended infinite rights to Lowe's, Inc. (corporation/merchant). In the Court of Appeals failure to overturn the District Court's dismissal of the case without determining the facts therein based on the Federal Rules of Evidence, a prejudicial error was created and affirmed. This prejudicial error substantially affected the Petitioner's legal rights and obligations, and presumptively his right to a jury trial. This prejudicial error should have been grounds for reversal of judgment or a new trial under Rule 59 Federal Rules of Civil Procedure. *Gertz v. Bass*, 59 Ill. App. 2d 180, 208 N.E.2d 113 (1965); *Erskine v. Upham*, 56 Cal.App. 2d 235, 132 P.2d 219, 228; *State v. Gilcrist*, 15 Wash.App. 892 552 P.2d 690, 693; *United States v. United States Gysum Co.*, 333 U.S. 364 (1948). The Court of Appeals affirmation in this case unfairly denied the Petitioner the right to a trial by jury under Seventh Amendment to the United States Constitution pursuant Rule 38 and 52 Federal Rules of Civil Procedure.

The Petitioner could have at pre-trial hearings and at trial met and maintained the evidentiary burden of proof. Based on the evidence in this case, any reasonable jury would return a verdict in favor of the Petitioner. The Court of Appeals affirmation of the District Court im-

proper dismissal resulted in denial of justice to the Petitioner. *Anderson v. Bessemer city*, 470 U.S. 564 (1985); *Orvis v. Higgins*, 180 F.2d 537 (2nd Cir. 1950), cert denied, 340 U.S. 810 (1950); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

In *Jones v. Alfred Meyer Co.*, 392 U.S. 409, 88 S. Ct. 2186, 20 L.Ed. 2d 1189 (1968), the Court indicated that the Thirteenth Amendment was intended to prohibit not just slavery but the " badges and incidents of slavery". The Court ruled that the Amendment's Prohibitions are not only against government but also against private entities and persons who intentionally commit discriminatory acts. In *Jones*, the controversy arose when defendants refused to sell land to Blacks. The plaintiffs Jones and his wife sued; claiming they had not been allowed to buy property because he Black. There were no state or federal aid or actions which might have subjected the defendants to federal statutes prohibiting such discrimination. The principle issue in this case was one of private racial discrimination. To decide this case, the Court revivified a provision of the 1866 Civil Rights Act, Section 1982. The Court concluded based upon judicial and legislative history that the drafters intended the act to apply to private as well as public acts of discrimination. The Court ruled legislation rationally connected with the eradicating of slavery and its " badges or incidents" is valid under the Thirteenth Amendment, and that private discrimination may constitute such a " badge or incident". While the Petitioner's case would not be covered under Public Accommodations, it would be covered under *Jones*. A federal claim exists because of the act of intentional discrimination. The Court has repeatedly affirmed this ruling. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969). Section 1983 while primarily directed at actions by state and local governments, it also prohibits intentional private discrimination. *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Monell v. Department of Social Services*, 426 U.S. 658

(1978);*Richarson v. Miller*, 446 F.2d 1247 (3rd cir. 1971); Griffin v. Breckenridge, 403 U.S. 88 (1971). Some lower courts have rules that under certain conditions the Fourteenth Amendment is applicable to acts of private discrimination. *Westbury v. Gilman Paper Co.*, 507 F.2d 206 (5th cir. 1975) (42 U.S.C.A. 1985(3)).

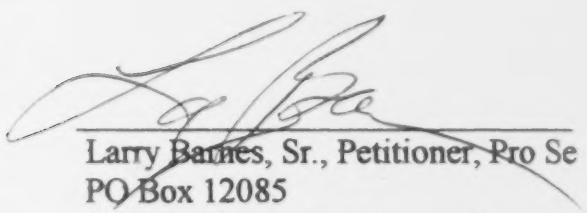
Lowe's, Inc. committed racial profiling and a conspiracy to falsify the course of events in violation the Petitioner's rights under Section 1985. The conspiracies in this case are widespread, including denial of the entire incident as verified by the proceedings in this case. To prove a conspiracy under Section 1985, there must be 1) two or more parties involved, 2) race based-invidious discrimination, 3) a deprivation of equal enjoyment of rights, 4) resultant injury and, 5) an overt act. The records of the filings in this case shows that the Petition's case meets all five of these criteria. *Bushi v. Kirven*, 775 .2d 1240, 1257 (4th Cir. 1985); Griffin v. Breckinridge 403 U S 88 102-03 (1971).

The practice of racial profiling by retail merchants is a very important issue of federal law concerning the constitutional rights of those who are victims. As illustrated in this case, it is the basis for the violation of individual civil liberties and constitutional rights. However, this Honorable Court has never decided the constitutionality of racial profiling and discrimination by private retail merchants. The extraordinary remedy provided by a writ of certiorari pursuant to 28 U.S.C. 1254(1) is the only means available for the Petitioner to have a fair and impartial litigation of his constitutional claims.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1878

LARRY BARNES, SR., M.D., J.D.,

Plaintiff - Appellant,

versus

LOWE'S COMPANIES, INCORPORATED,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (CA-97-1040-5-BO)

Submitted: July 30, 1998 Decided: August 26, 1998

Before WIDENER, LUTTIG, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Larry Barnes, Sr., Appellant Pro Se. Robert W. Sumner, Kari Russwurm Johnson, CRANFILL, SUMNER & HARTZOG, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant appeals the district court's order granting Defendant's motion to dismiss. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Barnes v. Lowe's Companies, Inc., No. CA-97-1040-5-BO (E.D.N.C. May 14, 1998). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

APPENDIX A

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

FILED
MAY 14 1998
DAVID W. DANIEL, CLERK
US DISTRICT COURT
E. DIST. N. CAROLINA

No. 5:97-CV-1040-BO(2)

LARRY BARNES, SR., M.D.,

Plaintiff,

v.

LOWE'S COMPANIES, INC.,

Defendant.

ORDER

This matter is before the Court on Defendant's Motion to Dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant's Motion to Strike portions of Plaintiff's complain, and Plaintiff's Motion for Leave to Amend his complaint. The underlying action asserts causes of action under the Thirteenth and Fourteenth Amendments to the United States Constitution; Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, as amended; section 1981, 1982, 1983, and 1985 of Title 42 of the United States Code; and several state law causes of action. Upon consideration of the parties' arguments, and for the reasons discussed herein, Defendant's motion will be granted and Plaintiff's complaint dismissed in its entirety.

BACKGROUND

On December 30, 1995, Plaintiff Larry Barnes, Sr., M.D. (hereinafter, "Dr. Barnes"), entered the Lowe's Home Improvement Warehouse, a retail establishment of the Defendant, Lowe's Companies, Inc. ("Lowe's"), in Raleigh, North Carolina. After Plaintiff paid for his purchases and obtained a receipt, he was confronted by a Lowe's "Theft Prevention Officer,"

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Gene Blount ("Blount") as he left the store. Blount asked Plaintiff to produce a receipt for the items in his shopping cart. Plaintiff alleges that Blount searched his shopping cart in a hostile manner. Apparently finding nothing in Plaintiff's possession that did not belong to him, Blount returned to the store. Dr. Barnes followed Blount inside, approached the service desk, and asked for Blount's name, as well as the address of Lowe's company headquarters. Plaintiff wrote several letters to Lowe's corporate officials but received no apologies or compensation for his alleged grievances.

Plaintiff brought this action on December 30, 1997, alleging that he was detained and searched because he is African-American, and Lowe's acts of "mercantile racism" violated his federal constitutional rights and gave rise to state tort causes of action for false imprisonment, defamation, corporate malpractice and negligence. Plaintiff seeks compensatory damages of one million dollars and punitive damages of twenty-five million dollars. Defendant filed the instant motion to dismiss, as well as a motion to strike parts of Plaintiff's complaint,[1] on March 4, 1998. Plaintiff filed a motion for leave to file an amended complaint on March 24, 1998, and a response to Defendant's motion to dismiss on March 27, 1998. All of the pending motions are now ripe for adjudication.

DISCUSSION

A. Plaintiff's Motion for Leave to Amend

Rule 15(a) of the Federal Rules of Civil Procedure gives the Court discretion to allow a party leave to amend its complaint after a responsive pleading has been filed. This discretion

[1] Having considered the allegedly improper allegations in Plaintiff's complaint, the Court hereby DENIES Defendant's Motion to Strike pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

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includes the right to deny leave to amend when the proposed amendments would be futile. Finding that the amendments proposed by Plaintiff do not set forth new valid causes of action, and merely restate claims made in Plaintiff's original complaint, the Court hereby DENIES Plaintiff's Motion for Leave to Amend his complaint.

B. Defendant's Motion to Dismiss

Motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure should only be granted in limited circumstances. De Sole v. United States, 947 F.2d 1169, 1171 (4th Cir. 1991); Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir 1989). Inferences should be construed in the light most favorable to the party opposing the motion, and the motion should be granted only if that party has no chance of prevailing on the merits of its argument.

1. **Plaintiff's Federal Claims.** Plaintiff fails to state a claim under Title II because Lowe's is not a "place of public accommodation" as defined by that statute. Plaintiff fails to allege facts that would indicate that the Lowe's facility in Raleigh is anything other than a retail establishment. Congress defined places of public accommodation as including "restaurant[s], cafeteria[s], lunchroom[s] . . . or other facilit[ies] principally engaged in selling food for consumption on the premises." 42 U.S.C. § 2000a(b)(2). Also included are hotels, inns, motels, etc., 42 U.S.C. § 2000a(b)(1), and motion picture houses, theaters, stadiums, and the like, 42 U.S.C. § 2000a(b)(3). Congress did not include retail stores under the definition of places of "public accommodation," and Dr. Barnes cannot ground a lawsuit on Title II based on the conduct alleged to have occurred at the Lowe's Raleigh facility.

Similarly, Plaintiff fails to properly ground his complaint under section 1983 and 1985 of Title 42. Section 1983 requires a showing of state action, which Plaintiff does not allege in this

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case. And, while section 1985 does not require a showing of state action, a claim under subsection three (3) of this section (which is the only arguably applicable subsection) requires two or more persons to conspire to deprive any person or class of persons of the equal protection of the laws. Thus, like all other claims under the Fourteenth Amendment, claims brought pursuant to section 1985 require state action. Plaintiff thus may not rely on section 1983 or 1985 as a basis for his claims.

Nor does Plaintiff properly allege a cause of action under sections 1981 or 1982. Section 1981 provides that all persons "shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Section 1982 provides that all citizens shall have the same right to "inherit, purchase, lease, sell, hold, and convey real and personal property." Plaintiff simply does not allege the type of conduct by Defendant that would implicate the rights protected by these statutes. Plaintiff's federal claims must therefore be dismissed for failure to state a claim.

2. Plaintiff's State Law Claims. Having dismissed the federal basis of Dr. Barnes' complaint, the Court must now decide whether to exercise its discretion and retain jurisdiction over the supplemental, state-law claims. In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the United States Supreme Court emphasized that the federal courts power to hear pendent claims "is a doctrine of discretion, not of plaintiff's right." 383 U.S. at 726, 86 S. Ct. at 1139. The doctrine of Gibbs and its progeny was codified in Section 1367 of Title 28 of the United States Code, under the name "supplemental jurisdiction," as part of the Judicial Improvements Act of 1990, Pub.L. No. 101-650, Title III, § 310. The Fourth Circuit, interpreting Section

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1367, has noted that "[t]he doctrine of supplemental jurisdiction indicates that federal courts generally have discretion to retain or dismiss state law claims when the federal basis for an action drops away." Shanaghan v. Cahill, 58 F.3d 106, 109 (4th Cir. 1995).

The Fourth Circuit emphasized "that trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished." Id. at 110. Thus, this Court will consider factors such as convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and judicial economy. Id.

While the case has not advanced past the motion to dismiss stage, the parties have expended much time and energy in prosecuting and defending this action. Also, the status of the law required to resolve this state law issue is well-settled in North Carolina, and does not require this Court to anticipate a decision of the North Carolina courts. Thus, the principle of comity can be respected while retaining jurisdiction of this claim. The Court will thus consider Plaintiff's state law claims.

Plaintiff's causes of action for false imprisonment and slander are barred by the applicable statute of limitations. Section 1-54(3) of the North Carolina General Statutes states that causes of action for "libel, slander . . . or false imprisonment" must be brought within one year of the date of the alleged incident. The facts complained of by Dr. Barnes in this matter are alleged to have occurred on December 30, 1995; Plaintiff did not initiate this action until December 30, 1997, two years after the date of the incidents in question.

Plaintiff's fourth and fifth claims for relief accuse Lowe's of failing to follow the appropriate "standard of care" and making an "incorrect diagnosis," and of negligently failing to

APPENDIX B

train its employees "to respect human dignity." These claims are insufficient as a matter of law. While Plaintiff accuses Lowe's employees of making an "incorrect diagnosis" that he was a shoplifter, his factual allegations are simply insufficient to show that the employees behaved improperly in simply asking him for a receipt for his purchases. Merely being asked to produce a receipt for one's purchases does not rise to the level of harm which is an essential element of a negligence claim.

Plaintiff's state law causes of action are therefore all insufficient as a matter of law and must be dismissed.

CONCLUSION

For the reasons stated above, the Court hereby GRANTS Defendant's Motion to Dismiss Plaintiff's complaint in its entirety.

SO ORDERED.

This 9th day of May, 1998.

/s/ Terrence W. Boyle

TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By /s/ Rebeca Bowen
Deputy Clerk

APPENDIX B

United States District Court

Eastern District of North Carolina

FILED

MAY 14 1998

DAVID W. DANIEL, CLERK
US DISTRICT COURT
E. DIST. N. CAROLINA

LARRY BARNES, SR., M.D.

Plaintiff,

v.

Judgment in a Civil Case
Case Number: 5:97-CV-1040-BO(2)

LOWE'S COMPANYIES, INC.

Defendant.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendant's motion to dismiss is granted and this action is hereby DISMISSED;

JUDGMENT FILED AND ENTERED THIS 14TH DAY OF MAY, 1998, AND COPIES MAILED TO:

Larry Barnes, Sr., M.D.
Plaintiff Pro Se
2920 Legging Lane
Raleigh, NC 27615

Robert W. Sumner, Esq.
Cranfill, Sumner & Hartzog
P. O. Box 27808
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May 14, 1998

DAVID W. DANIEL, CLERK

/s/ Rebeca Bowen
Deputy Clerk

APPENDIX B

FILE COPY

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 19, 1998

No. 98-1878
CA-97-1040-5-BO

LARRY BARNES, SR., M.D., J.D.

Plaintiff - Appellant

v.

LOWE'S COMPANIES, INCORPORATED

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX C

Supreme Court, U.S.
FILED
MAR 3 1999

No. 98-1225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LARRY BARNES, SR., M.D.,

Petitioner,

vs.

LOWE'S COMPANIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Fourth Circuit properly affirm the District Court's dismissal of Petitioner's federal claims based upon Petitioner's failure to allege a valid constitutional or statutory basis for his claims or to allege sufficient facts in the Complaint setting forth a valid claim of racial discrimination?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this Respondent's Brief in Opposition.

STATEMENT PURSUANT TO RULE 29.6

Lowe's Companies, Inc., is the parent company of Lowe's Home Centers, Inc., which is a wholly owned subsidiary of Lowe's Companies, Inc. The Contractor Yard, Inc., is a wholly owned subsidiary of Lowe's Home Centers, Inc.

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STATEMENT OF THE CASE

A. Procedural History

On December 30, 1997, Plaintiff-Petitioner Larry Barnes (hereinafter referred to as "Petitioner") filed this action against the Defendant-Respondent Lowe's Companies, Inc. (hereinafter referred to as "Lowe's") in the United States District Court for the Eastern District of North Carolina. In the Complaint, Petitioner alleges that upon leaving a Lowe's store on December 30, 1995, he was approached by a Lowe's employee who asked to check Petitioner's shopping bags and verify his receipt. Petitioner, a black male, alleges in the Complaint that this conduct constituted "mercantile racism." He further asserts that his federal constitutional rights were violated by the Lowe's employee. Specifically, he alleges that Lowe's violated his rights pursuant to the Thirteenth and Fourteenth Amendments and that a cause of action for "mercantile racism" is actionable pursuant to 42 U.S.C. §§ 2000(a-e), 1981, 1982, 1983 and 1985. Petitioner also includes in the Complaint the following state tort causes of action: false imprisonment, defamation, corporate malpractice and negligence. Petitioner seeks compensatory damages in the amount of one million dollars and punitive damages in the amount of twenty-five million dollars. (Respdt. App. A)

Lowe's filed a "Waiver of Service of Summons" on January 3, 1998 and timely filed its Answer on March 4, 1998. In its Answer, Lowe's denied all allegations of wrongdoing and asserted a Motion to Dismiss all claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Lowe's also asserted numerous affirmative and other defenses, including the defense of the statutes of limitations in connection with Petitioner's state tort claims.

On March 24, 1998, Petitioner filed a Motion to Amend the Complaint and a Proposed Amended Complaint. In his Amended Complaint, Petitioner attempts to assert two new causes of action: a federal claim for the violation of his Fourth Amendment right to be free from an illegal search and detention without probable cause and a state tort claim for intentional and negligent infliction of emotional distress. (Respdt. App. B) Various responses and replies were filed by the parties in connection with the pending motions.

On May 14, 1998, the United States District Court filed its Order and Judgment denying Petitioner's Motion to Amend the Complaint and granting Lowe's Motion to Dismiss. The District Court dismissed all of Petitioner's federal claims, and in its discretion, exercised supplemental jurisdiction over Petitioner's state tort claims and dismissed these claims as well. (Pet. App. B)

On June 11, 1998, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit. In an unpublished per curiam Opinion (decided August 26, 1998), the Fourth Circuit affirmed the rulings of the United States District Court. Upon receiving the Opinion of the Fourth Circuit, Petitioner filed a Petition for Rehearing and a Suggestion for Rehearing En Banc. These Petitions were denied by the Fourth Circuit on October 19, 1998.

Petitioner filed the instant Petition for Writ of Certiorari with the United States Supreme Court on February 1, 1999. Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, Lowe's herein submits its responsive brief and respectfully requests that the Petition be denied.

B. Factual Allegations of Complaint

In his Petition to this Court, Petitioner recites and argues numerous facts which are not contained in the Complaint and therefore are irrelevant to the Rule 12(b)(6) motion in question. All of the factual allegations before the Court are contained in Paragraph 4 of the original Complaint. The proposed Amended Complaint contains no additional facts. (*See* Respdt. App. A, B).

In Paragraph 4 of his Complaint, Petitioner alleges as follows: On December 30, 1995, Petitioner went with his son to a Lowe's store located in Raleigh, North Carolina, in order to purchase a replacement water filter cartridge. Petitioner's son stayed in the car while Petitioner went into the store. After Petitioner found the filter cartridge, he was on his way to the checkout area when he noticed that the store was having a clearance on computers and related items. He found a number of good buys and began picking up items and examining them for purchase. Petitioner soon had more items than he could hold, so he placed the items into "an unattended shopping cart in the middle of an aisle with trash in the bottom which consisted of paper and cardboard fragments and flattened boxes." Petitioner alleges in the Complaint that after he put numerous items in the cart, he changed his mind about certain items. He then removed some items from the cart and proceeded to the checkout line, where he paid for the purchases and obtained a receipt.

In the Complaint, Petitioner alleges that as he was leaving the store, he was approached by a Lowe's Theft Prevention Officer named Gene Blount. At that point, the items which Petitioner had purchased were still in the cart with the trash and empty boxes. Petitioner alleges that Gene Blount approached him, asked to see his receipt, and then searched

Petitioner's parcels and threw the trash out of the cart. These are the only actions alleged by Petitioner in connection with Gene Blount. There are no allegations that Gene Blount attempted to detain Petitioner, that he made Petitioner return to the store or that Gene Blount took any further action against Petitioner. Petitioner alleges in the Complaint that he was free to go after Gene Blount verified his receipt. There are no allegations that Gene Blount called Petitioner any names or that any racial comments of any nature were made by Gene Blount during his encounter with Petitioner.

Petitioner states in Paragraph 4 of the Complaint that after being approached by Blount, *Petitioner* became "extremely angry and released a barrage of verbal expletives which drove his assailant, the Lowe's Theft Prevention Officer, back into the establishment from whence he had come." Petitioner alleges that he went back into the store and inquired into the identity of Gene Blount. He further alleges that while he was in the store, an African American employee told Petitioner that he had been given "the nigger treatment." Petitioner refuses in the Complaint to identify the employee who allegedly made this comment, claiming that the employee "wished to remain anonymous." While Petitioner alleges in the Complaint that other white customers were allowed to leave the store without being approached, he provides no other factual allegations regarding the alleged white customers or the circumstances surrounding the other customers. There are no allegations that these other customers left the store with items in a cart containing empty boxes and trash as did Petitioner on the date in question when he was approached by Gene Blount for a receipt verification.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI PRESENTS NO VALID REASON JUSTIFYING FURTHER REVIEW OF THIS CASE BY THE SUPREME COURT OF THE UNITED STATES.

Review on a writ of certiorari is not a matter of right, but of judicial discretion, and a petition will be granted "*only for compelling reasons.*" Sup. Ct. R. 7. Although the list is not exhaustive, the Rules of the Supreme Court of the United States provide that a grant of certiorari is typically reserved for cases where:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

Jurisdiction to review judgments and decrees by certiorari is to be exercised sparingly, only in cases of "gravity and general importance," or where a "real and embarrassing conflict of opinion and authorities" exists among the courts of appeals. *State of Ohio ex rel. Seney v. Swift & Co.*, 260 U.S. 146 (1922).

In the instant case, the Petition for Writ of Certiorari fails to satisfy the criteria for review by this Court. First, Petitioner

effectively concedes that there is no conflict among the federal courts on the issue raised by this petition. Indeed, Petitioner himself cites only one case that appears to have addressed the issue of mercantile discrimination, *Priddy v. Shopko Corporation*, 918 F. Supp. 358, 359 (D. Utah 1995), which **supports** the dismissal of the complaint, in this case. Second, Petitioner has not and cannot show that the decisions of the Fourth Circuit and District Court departed in any way from the accepted course of judicial proceedings. To the contrary, as will be argued below, these courts properly concluded that Petitioner has no valid constitutional or statutory basis for his complaint. Third, the allegations of the Complaint fail to sufficiently allege a valid claim for racial discrimination, even if such a claim existed. Finally, this Court lacks the power to do what Petitioner ultimately seeks by this petition: to create a new cause of action for "racial profiling."

A. Petitioner's federal claims were properly dismissed by the District Court because Petitioner failed to allege a valid constitutional or statutory basis for recovery.

In the Complaint, Petitioner alleges that Lowe's violated his rights under the Thirteenth and Fourteenth Amendments of the United States Constitution. Petitioner further asserts that he has a federal cause of action against Lowe's for the violation of these constitutional rights pursuant to 42 U.S.C. §§ 2000(a-e), 1981, 1982, 1983 and 1985.

Clearly, no violation of the Thirteenth Amendment occurred, here. The Thirteenth Amendment of the United States Constitution prohibits slavery and involuntary servitude, which is not alleged here. Likewise, the Fourteenth Amendment has no application, since there is no state action, in this case. *West v. Atkins*, 487 U.S. 42 (1988).

Moreover, the Fourth Circuit and the District Court correctly concluded that none of the federal statutory provisions asserted in the Complaint provide a valid basis for recovery. 42 U.S.C. § 2000 and its subparts clearly do not apply to this action. Although 42 U.S.C. § 2000a prohibits discrimination "in places of public accommodation," this does not include public retail establishments. The statute itself lists the types of establishments within its purview, *i.e.*, those engaged in the selling of food, hotels or places of entertainment. Thus, in *Priddy v. Shopko Corp.*, *supra*, the court stated:

> It is clear that Congress did not intend for retail establishments . . . to be included in § 2000a . . . The clear implication of this provision is that Congress did not intend to include retail establishments . . .

Significantly, in his petition, Petitioner himself quotes this language from *Priddy*. (Petition p. 7)

The other subparts of 42 U.S.C. § 2000 also do not apply to the facts alleged in the Complaint. 42 U.S.C. § 2000b deals with actions filed by the Attorney General. Section 2000c concerns public education. Section 2000d prohibits the exclusion of federal assistance based upon race, and section 2000e concerns employment.

The Fourth Circuit and District Court also correctly ruled that Petitioner failed to assert a proper claim pursuant to 42 U.S.C. §§ 1983 and 1985. Section 1983 requires a showing of state action, which is not alleged or involved in this case. *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 937 (1982).

42 U.S.C. § 1985 prohibits conspiracies "between two or more persons." In this case, there are not even any *conclusory*

allegations in the Complaint regarding a conspiracy between two or more persons. Moreover, a corporation, such as Lowe's, cannot conspire with its own employees. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

The final statutory provisions asserted in the Complaint are 42 U.S.C. §§ 1981 and 1982. Section 1981 provides that all persons

> shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .

Section 1982 provides that all citizens shall have the same right to "inherit, purchase, lease, sell, hold, and convey real and personal property."

In this case, the gravamen of Petitioner's complaint is that Petitioner was approached by a Lowe's employee who asked to verify Petitioner's receipt as he exited the Lowe's store carrying numerous items in a cart containing trash and empty boxes. There are no allegations that Petitioner's ability to make or enforce contracts was interfered with by the Lowe's employee on December 30, 1995. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Moreover, there are no allegations that Petitioner's ability to inherit, purchase, sell, hold and convey property was jeopardized. Based upon Petitioner's failure to allege facts that would bring these statutes into play, the Fourth Circuit and District Court correctly ruled that Petitioner has no valid federal claim pursuant to these statutes.

B. The complaint does not allege intentional racial discrimination.

In his Petition, Petitioner all but admits that the Fourth Circuit and the District Court correctly applied the law in this case and that the above noted statutory provisions do not apply to the facts alleged in the Complaint. Petitioner instead argues that by dismissing his claims, the District Court effectively ruled that a claim for "racial profiling" does not exist and that it is now incumbent upon the Supreme Court of the United States to review this case and create a new cause of action for Petitioner.

Petitioner's argument is without merit. The rulings of the Fourth Circuit and the District Court do not stand for the proposition that a person who has been the victim of racial discrimination has no legal recourse. The courts ruled only that Petitioner's Complaint failed to state a valid claim. Numerous federal statutes prohibit racial and other discrimination. Also, numerous state tort claims exist which would prohibit discriminatory conduct, including but not limited to the claims of false imprisonment, malicious prosecution and emotional distress. In order to prevail on these claims, however, a plaintiff must allege proper facts supporting these claims and he must also file these claims prior to the running of the applicable statutes of limitations.

In this case, the face of the Complaint reveals that Petitioner has not alleged sufficient facts to support a claim based upon racial discrimination or "racial profiling." As such, even if there were no existing legal remedies for victims of racial profiling, which is denied, the instant case would not be a proper case for review by this Court.

An essential requirement of all claims based upon racial discrimination is that it be shown that the defendant acted with

the intent to discriminate due to the plaintiff's race. The federal courts have held that in order for a complaint alleging racial discrimination to be valid under 42 U.S.C. §§ 1981 or 1983, the complaint must contain more than conclusory allegations of racial discrimination. Although a plaintiff does not have to make an evidentiary showing at this stage, "[c]onclusory allegations of discrimination . . . not supported by any reference to particular acts, practices, or policies" are insufficient to state a claim of discrimination under § 1983. *United Black Firefighters of Norfolk v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979). In *Odum v. Columbia University*, 906 F. Supp. 188, 194 (S.D.N.Y. 1995), the court explained:

> Essential to an action under section 1981 are allegations that the defendants' acts were purposefully discriminatory and racially motivated . . . In order to survive a motion to dismiss a section 1981 claim, a Plaintiff must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of racially discriminatory intent. It is not enough for a Plaintiff to recite mere conclusory allegations.

(citations omitted).

Based on these principles, federal courts have routinely dismissed complaints pursuant to Rule 12(b)(6) where the complaints failed to sufficiently allege specific facts of racially motivated discrimination. The case of *Davis v. Frapolly*, 747 F. Supp. 451 (N.D. Ill. 1989) is illustrative. In *Davis*, the plaintiff alleged in his complaint that he had been arrested, detained and charged with a crime solely because he was black and that this conduct violated his federal constitutional rights. As to the plaintiff's § 1981 claim, the court dismissed the

complaint stating that the complaint contained nothing more than conclusory statements that the defendant acted out of a racially motivated discriminatory intent. The court noted that the only allegations contained in the complaint to this point were conclusions made by the plaintiff that the actions were taken against him because he was black. The court found these allegations insufficient stating:

> Plaintiff claims that he was arrested, detained and charged solely because he is a black man. Yet, the amended complaint contains no allegations of discriminatory intent. *There is not one fact from which the court can draw an inference that defendant's actions were at all motivated by plaintiff's race. Simply put, based upon the facts plaintiff alleges, the court cannot infer that if plaintiff were white he would have been treated differently. A mere conclusory allegation of intentional discrimination is insufficient. (Citations Omitted) Under the rule that plaintiff advances, every black person who is arrested would be able to successfully plead Sec. 1981 and equal protection claims based solely upon the fact of their race.*

Davis, 747 F. Supp. at 453.

In *Odum, supra*, the District Court dismissed the plaintiff's claim that a private school discriminated against her due to her race. The court noted that the plaintiff's complaint contained nothing more than conclusory allegations of racially motivated discrimination, stating:

> Even on a motion to dismiss, a court cannot accept naked assertions in a complaint that do not set forth supporting allegations of fact. A mere factual

> assertion of unequal treatment or race-motivated conduct is insufficient to survive a Rule 12(b)(6) motion; instead, a plaintiff must specifically allege the circumstances giving rise to a plausible inference of racially discriminatory intent.

Odum, 906 F. Supp. at 194-195.

In this case, the Fourth Circuit and District Court properly recognized that Petitioner's allegations of racially motivated discrimination were insufficient as a matter of law. The only facts alleged in the Complaint are that while exiting the store, Petitioner was approached by a Lowe's employee, Gene Blount, who searched Petitioner's bag and cart and verified his receipt. Petitioner does not allege that Gene Blount made any references to Petitioner's race during the encounter. Petitioner does not allege why race would have even factored in at all in connection with the decision of Gene Blount to approach Petitioner. In fact, the Complaint itself reveals that race was *not* a factor. In the Complaint, Petitioner specifically alleges that his cart was full of trash and empty boxes. This is why Petitioner was approached by Gene Blount. Petitioner alleges that Gene Blount went through the trash and boxes while verifying Petitioner's receipt. Clearly, the only reasonable inference that can be drawn from the Complaint is not that Petitioner was stopped because he is a black man but rather that Petitioner was approached because he was exiting the Lowe's store with a cart containing trash and empty boxes making it difficult for the Lowe's employee to determine if items not paid for might have been concealed in the cart.

It is important to note that Petitioner has not alleged any specific instances of other African Americans being approached or having their bags searched. There are no allegations of a plan or pattern on the part of Lowe's to discriminate. While

Petitioner alleges in the Complaint that white customers did not get stopped by Gene Blount, Petitioner does not allege that these customers were similar to Petitioner in that they were also exiting the store with a cart full of trash and empty boxes. In his Petition to this Court, Petitioner states that the white customers expressed dismay over the fact that Petitioner had been approached by Gene Blount. Even if this were relevant to the issue at hand and true, which is denied, no allegations to this effect are contained in the Complaint. This is but one example of how Petitioner argues facts to this Court in his Petition which are not contained in the pleadings in this case.

The only allegation in the Complaint regarding race is the alleged statement made by an unidentified black male in the store who allegedly stated that Petitioner got the "nigger treatment." Petitioner does not identify this person in the Complaint, alleging that this person wishes to remain anonymous. Lowe's contends that this statement is not a proper allegation for a complaint and that it should have been stricken from the Complaint in this case. Lowe's further contends that this statement, even if proper for a complaint, does not constitute a sufficient pleading of racial discrimination on the part of Lowe's. The statement is nothing more than a conclusory allegation of a third person expressing *his* opinion concerning Lowe's intent — it does not establish Lowe's intent any more than Petitioner's own opinion establishes such intent.

Accordingly, the Complaint in this case is not sufficient to support a claim of racial discrimination or "racial profiling" under any theory. The Complaint contains no valid factual allegations forecasting that the conduct of Gene Blount was racially motivated. The facts as alleged establish instead that Petitioner was approached because his cart was filled with trash and empty boxes. After Petitioner's receipt was verified, Gene Blount's encounter with Petitioner ended. Petitioner was not

asked to return to the store. Petitioner was not charged with any crimes. On his own, Petitioner chose to return to the store and it was Petitioner who engaged in a verbal "barrage" against Gene Blount. Petitioner alleges in the Complaint that *Petitioner* became "extremely angry and released a barrage of verbal expletives which drove his assailant, the Lowe's Theft Prevention Officer, back into the establishment from whence he had come." (Complaint, Paragraph 4) There are no allegations in the Complaint that Gene Blount responded in kind to Petitioner or that Gene Blount's interest in Petitioner continued after the verification of the store receipt.

Clearly, the allegations of the Complaint do not justify further review by this Court. While Lowe's certainly does not condone "racial profiling," the facts of the instant case do not establish discrimination of any nature on the part of Lowe's. The only thing established by the Complaint is that Petitioner, a black male, had his receipt verified as he exited Lowe's store while pushing a cart full of trash and empty boxes. Based upon the failure of Petitioner to allege sufficient factual allegations of racial discrimination, the Fourth Circuit and District Court properly dismissed Petitioner's federal claims.

C. This Court cannot legislate a new cause of action.

Finally, it is clear that the Petitioner urges this Court to do that which it is constitutionally prohibited from doing: to create a "new" federal cause of action against "racial profiling." Although Lowe's contends, primarily, that such a result is not warranted under the allegations of the Complaint, in this case, it further contends that even in a different case, alleging intentional racial discrimination by a retailer, such a result would be improper. It has long been recognized that this Court can only interpret the law, including the federal statutes and the Constitution; it has no inherent power or authority to

legislate new laws. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803); *McCray v. United States*, 195 U.S. 27 (1904). Thus, because the Complaint fails to state a cognizable claim for relief, and the Court lacks the authority to create a new cause of action not authorized by the Constitution or federal law, there are clearly no compelling circumstances warranting the granting of a writ, in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — AMENDED COMPLAINT DATED MARCH 24, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION
CASE NO. 5:97-CV-1040-BO2

LARRY BARNES, SR., MD

Plaintiff

vs.

LOWE'S COMPANIES, Inc.

Defendant

AMENDED COMPLAINT

1. The Plaintiff is an individual citizen of the State of North Carolina and resides in Wake County.

2. The Defendant, Lowe's Company Inc., is a corporation organized and doing business under the laws of North Carolina but with offices and retail outlets nationally. The corporate headquarters of the named defendant is located at State Highway 268 East (Elkin HWY.), North Wilkesboro, North Carolina 28659. The corporation operates retail outlets throughout the United States, including a unit referred to as Lowe's Home Improvement Warehouse located at 4601 Capital Boulevard, Raleigh, North Carolina 27604. It is the incident at this location from which the cause of action resulted.

Appendix A

3. The jurisdiction of this action is pursuant legislative act and judical rulings as follows; U.S. Constitution, Bill of Rights, Fourth Amendment, U.S. v. Riemer,D.C. Ohio 392 F.Supp. 1291. 1294, Thirteen Amendment as amended by United States Supreme Court ruling Jones vs. Alfred H. Meyer Co 392 U.S. 409 (1968)/Sullivan vs. Little Hunting Park 369 U.S. 229 (1969)/Johnson vs. Railway express Agency 421 U.S. 454 (1975), Fourteenth Amendment section 1883, Eaton v. State,Del. 363 A.2d 440.441, General Building Contractors Association, Inc v. Pennsylvania 458 U.S. 375(1982), U.S.C. 42 sections 1981,1992,1983,1985, and1986, Civil Rights Act of 1866 sections 1981 and 1982, Civil Rights Act of 1871 sections 1983 and 1985, Civil Rights Act of 1964 Title II, 42 U.S.C. 2000a(a-e), Heart of Atlanta Motel vs. United States 379 U.S. 241 (1964), Time,Inc vs. Firestone 424 U.S. 448, 460 (1976), Burton vs. Wilmington Parking Authority 365 U.S. 715 (1961), Bob-lo Excursion Co vs. Michigan 333 U.S. 28 (1948), Bell vs. Kenwood golf and Golf and country club 312 F. Supp. 753 (1970), Dupler vs. Seubert, 69 Wis 2 373, 381 230 N.W. 2d 626,631 (1975), Healy vs Sea Gull Speciality Co 237 U.S. 479 480, 35S. ct. 658 659 59 L.E.d 1056 (1915) and other laws and rulings as amendments needed.

4. The Plaintiff alleges and says that on December 30, 1995, the Plaintiff who is an African American physician, went to Lowe's Home Improvement Warehouse located at 4601 Capital Boulevard in Raleigh, North Carolina. The purpose of this shopping excursion was to purchase a replacement water filter cartridge for a water filtration unit that had been purchased at the Lowe's Home Improvement Warehouse previously. The Plaintiff was accompanied on this trip by his sixteen year old son who decided to remain in the car since the Plaintiff was to pick up one item quickly and return home. The specific item in

question was a Teledyne cartridge filter with Lowe's Item # 25694 with a purchase price of $5.96. The Plaintiff left his son in the car, telling him that he would be back in less than five minutes; then he rushed into the retail outlet. The Plaintiff went in the retail establishment with the clear intent of purchasing merchandise which the mercantile establishment offered for sale. At the time, the Plaintiff entered the mercantile establishment known in this action as Lowe's Home Improvement Warehouse. The Plaintiff had ample financial resources on him to purchase the item of intent. At the time the Plaintiff entered the establishment operated by the defendant, he had the following assets on his person: $2,500 cash (U.S. Currency), credit cards with purchasing power of $30,000.00, and a credit card issued by the defendant (Lowe's Company Credit) in the amount of $4,000. Hence, the Plaintiff entered the establishment with purchasing power of $36,500. After entering the establishment and locating Lowe's item # 25694 Teledyne cartridge, the Plaintiff proceeded towards the checkout area. However, on the way to the front of the store the Plaintiff noticed that the establishment was having a clearance on computers and related items. Noting what appeared to be a number of good buys, the Plaintiff began picking up and examining items for purchase and soon had more items than he could carry in his hands. At this point, the Plaintiff realized that he needed a shopping cart or some way to carry the numerous items that he had planned to purchase. The Plaintiff saw an unattended shopping cart in the middle of an isle with trash in the bottom which consisted of paper and cardboard fragments and flatten boxes. Since no other customer claimed the cart and there were no objections from store personnel, the Plaintiff decided to use this unclaimed shopping cart to carry his unplanned purchases to the checkout. Many of the items under scrutiny did not have prices posted. A Lowe's

employee, after doing several price checks, helped me load several of the bulkier items into the cart. Having second thoughts, the Plaintiff decided not to purchase the larger more expensive items, but did keep a dozen or so smaller items. The Plaintiff proceeded to the checkout area with the merchandise he had planned to purchase. After arriving at the checkout counter, the Plaintiff placed each item on the counter. The items where checked and bagged by the clerk. After receiving payment, the clerk put the transparent bags into the same cart that I had used to bring the items to the checkout. The Plaintiff was given a receipt and proceeded to push the shopping cart through the exit uneventfully. After leaving the store and while in the parking lot, the Plaintiff was approached by a Lowe's employee who was identified as "Gene Blount". This person who henceforth in this action shall be called Lowe's Theft Prevention Officer, savagely and rudely approached the Plaintiff and accused the Plaintiff of **SHOPLIFTING.** Outside of the store in the parking lot, Lowe's Theft Prevention Officer began tearing through the Plaintiff's shopping cart like a demon possessed maniac. He performed a strip search of parcels and the shopping cart, throwing trash out of the cart and going through each bag demanding to see my receipt. This indignity caught the Plaintiff completely off guard, in that the Plaintiff had not stolen nor conspired to steal any item or items from Lowe's Home Improvement Warehouse. The Plaintiff has no criminal background and is not a thief! This entire episode took place in an open parking lot with dozens of people viewing. The event unfolded with such speed and brutality that it took the plaintiff several minutes to get his bearing in this situations; after which the Plaintiff behaved as any totally innocent victim would have under similar circumstances. The Plaintiff, who is normally a pacifist, became extremely angry and released a barrage of verbal expletives which drove his assailant, Lowe's

Appendix A

Theft Prevention Officer, back into the establishment from whence he had come. The Plaintiff followed the Lowe's Theft Prevention Officer in hot pursuit back inside of the establishment to make an inquiry. The defendant's employee had not given me his name. This information was obtained from the store personnel after the Plaintiff returned inside of the store to express his indignation at being publicly humiliated, defamed, and dehumanized. A young African American male Lowe's employee who had witnessed this atrocity and wished to remain anonymous for fear of loss of employment, said: "man they dissed(disrepected) you, they gave you nigger treatment, but, I need this job." Upon returning to the Plaintiffs car, the Plaintiff's son inquired as to why the Plaintiff was so upset and why had it taken so long? An explanation was given to my son who became upset and saddened. The Plaintiff returned home with elevated blood pressure suffering with chest and epigastric pain. The Plaintiff related this incident to friends and family who were in shock and incredulity.

5. The Plaintiff alleges and says that the aforementioned actions by the Defendant was morally wrong and outrageous and represents an invasion of the Plaintiff's physical and psychological integrity. The Plaintiff was publicly humiliated, defamed, slandered, libeled and otherwise subjected to injurious acts by the Defendant. The Defendant was negligent and acted with reckless disregard in this act of **"MERCANTILE RACISM"** and Racism per se. The Plaintiff has suffered much mental anguish which in effect is **"cruel and unusual punishment"** caused by the racism and negligence of the defendant.

Appendix A

FIRST COUNT

6. The Plaintiff as a result of the acts of the Defendant has been the victim of racial discrimination and violation of civil rights. The Defendant used Race as a basis for its illegal search and seizure. There was not probable cause in the action taken against the Plaintiff except the use of Race or **"Black Codes"**. The Plaintiff argues on Factual issues because a reasonable jury would find that the defendant had no probable cause to believe that the Plaintiff was a thief or a shoplifter. The plaintiff was singled out because of his race. The Plaintiff met all reasonable requirements for reasonable behavior, in that he paid for all mechandise before exiting, had material bagged, and got a receipt. White customers could be seen existing the establishment with merchandised unbagged, and without visible receipts where not detained and searched. This dual standard represents a violation of the Plaintiff's civil rights as prescribed by Federal Law. The Defendant was practicing "Mercantile Racism".

SECOND COUNT

7. The Plaintiff was subjected to wrong detention and false imprisonment. The Defendant sought unlawful restraint of the Plaintiff's physical and psychological liberty without probable cause. A reasonable injury would find that the Defendant had no probable cause for detention. An over zealous racially motivated Theft Prevention Officer can not deprive an innocent citizen of his constitutional liberties.

THIRD COUNT

8. Defamation, defamation per se, slander, and libel were suffered by the Plaintiff as a result of the public humiliation

inflected by the Defendant. The Defendant made the Plaintiff into a public spectacle and object of shame and ridicule. The acts by the Defendant were injurious to the Plaintiff's (victim) reputation and disgraced him. There was no basis in truth or fact for said acts by the defendant, hence no probable cause for this malicious racist act.

FOURTH COUNT

9. Corporate Mal Practice resulted when the Defendant did not follow the "standard of care" and made an incorrect diagnosis when it labeled the Plaintiff as a thief or shoplifter. The Defendant used subjective bias criterion which resulted in an incorrect conclusion. This incorrect diagnosis resulted in harm to the Plaintiff both physically and mentally.

FIFTH COUNT

10. Negligence by the Defendant before and after the fact. The Defendant's employees were not trained to respect human dignity and how to handle the complications which could result from their action or failure to act. The Defendants communication with the Plaintiff that were incorrect and inappropriate either represent a bold defiance of existing law or ignorance, indifference, and incompetence.

SIXTH COUNT

11. Interference with the right to make and enforce contracts and ability to purchase personal property. The detention and strip searching of the plaintiff's packages in the parking lot was a scary ordeal. Because he had told his son that he would be in the store for only five minutes; yet, he had

remained in the store for over thirty minutes. The plaintiff had to leave the store before he had completed the inspection and purchase of the discontinued discounted merchandise. The plaintiff had planned to purchase additional merchandise from the discounted area; but because he had left his son in the car, he made his purchases and left the store with the intention of returning to purchase additional items after taking his son home. After the incident in question, the plaintiff felt intimidated and frightened. As a result of Lowe's wrongful acts with its Jim Crow and Black Code effect on the plaintiff, he could not come back to the store to complete his planned purchases. the plaintiff was subjected to humiliation, embarrassment, and the legacy of slavery now called "Consumer or Mercantile Rascism". The plaintiff was not treated like a White Man but the "Three-fifths Man" wearing the badges and incident of slavery. What reasonable person would have returned to Lowe's to resume shopping? The plaintiff would have been negligent, reckless, and would have assumed unnecessary risks had he attempted to shop for more discounted merchandise. Fear and intimidation prevented the plaintiff from further purchases. The action of Lowe's interfered with the right of the plaintiff to make further purchases or to enter into a retail contract. this racially discriminatory act is a violation of 42 U.S.C. sections 1981 and 1982. Lowe's intentional discrimination against the law abiding, God fearing plaintiff because he is an African American is clearly a violation of the plaintiff's civil rights. *Green v. State Bar of Texas, 27 F.3d 1083,1086 (5th cir. 1994), Mian v. Donaldson, Lufkin & Jenrette Securities Corp., 7 F.3d 1085,1087 (2d Cir.1993).*

SEVENTH COUNT

12. Intentional and negligent infliction of emotional distress. This event was scary! Lowe's exhibited extremely

outrageous conduct, abuse of power, and general reckless intolerable behavior. The disconcerting and humiliating experience was intended to cause severe emotional distress to the plaintiff. *Dickens v. Puryear 276 S.E. 2d 325,335 (NC1981), Harris v. Jones 281 Md. 560,380 A.2d 611 (1977).*

EIGHTH COUNT

13. Violation of fourth amendment rights. the plaintiff was subjected to illegal search and wrongful detention without probable cause. There were no reasonable grounds for accusing the plaintiff of shoplifting or theft. *U.S. v. Riemer, D.C. Ohio, 392 F. Supp. 1291, 1294*

14. The Plaintiff has carefully preserved the evidence from the ordeal. The original receipt, merchandise and bags have been carefully preserve as to be presented pursuant the rules of evidence. The Plaintiff is confident that a reasonable Jury will find in his favor.

WHEREFORE, Plaintiff demands Judgement against Defendant, for:

A. The Plaintiff demands a written apology for his indignity and humiliation and that should similar events occur in the further that the Defendant will "at least" have the courtesy to apologize.

B. The sum of $1,000,000.00 for compensatory damages

C. The sum of $25,000,000.00 for punitive damages

D. For such cost and further relief as the court may deem

Appendix A

By s/ Larry Barnes
Larry Barnes, Sr., MD Pro Se
2920 Legging Lane
Raleigh, North Carolina 27615
(919) 676-8205

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached court document on all parties to this cause by depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

Robert W. Sumner, Attorney at Law
Post Office Box 27808
Raleigh, North Carolina 27611-7808
(919) 828-5100

This 24th day of March, 1998.

s/ Larry Barnes
Larry Barnes, Sr., MD (Pro Se)
2920 Legging Lane
Raleigh, North Carolina 27611-7808
(919) 676-8205

APPENDIX B — COMPLAINT DATED AND FILED DECEMBER 30, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION
CASE NO. 5:97-CV-1040-1302

LARRY BARNES, SR., MD

plaintiff

vs.

LOWE'S COMPANIES, Inc.

defendant

COMPLAINT

1. The Plaintiff is an individual citizen of the State of North Carolina and resides in Wake County.

2. The Defendant, Lowe's Company Inc., is a corporation organized and doing business under the laws of North Carolina but with offices and retail outlets nationally. The corporate headquarters of the named defendant is located at State Highway 268 East (Elkin HWY.), North Wilkesboro, North Carolina 28659. The corporation operates retail outlets throughout the United States, including a unit referred to as Lowe's Home Improvement Warehouse located at 4601 Capital Boulevard, Raleigh, North Carolina 27604. It is the incident at this location from which the cause of action resulted.

Appendix B

3. The jurisdiction of this action is pursuant legislative act and judical rulings as follows; U.S. Constitution, Bill of Rights, Thirteen Amendment as amended by United States Supreme Court ruling Jones vs. Alfred H. Meyer Co 392 U.S. 409 (1968)/Sullivan vs Little Hunting Park 369 U.S. 229 (1969)/Johnson vs. Railway express Agency 421 U.S. 454 (1975), Fourteenth Amendment section 1883, Civil Rights Act of 1866 sections 1981 and 1982, Code 42 U.S.C. 1981, Civil Rights Act of 1871 sections 1983 and 1985(3), Civil Rights Act of 1964 Title II, 42 U.S.C. 2000a(a-e), Heart of Atlanta Motel vs. United States 379 U.S. 241 (1964), Time,Inc vs. Firestone 424 U.S. 448,460 (1976), Burton vs. Wilmington Parking Authority 365 U.S. 715 (1961), Bob-lo Excursion Co vs. Michigan 333 U.S. 28 (1948), Bell vs. Kenwood golf and Golf and country club 312 F. supp 753 (1970), Dupler vs. Seubert, 69 Wis 2 373, 381 230 N.W. 2d 626,631 (1975), Healy vs Sea Gull Speciality Co 237 U.S. 479 480, 35S. ct. 658 659 59 L.E.d 1056 (1915) and other laws and rulings as amendments needed.

4. The Plaintiff alleges and says that on December 30, 1995, the Plaintiff who is an African American physician, went to Lowe's Home Improvement Warehouse located at 4601 Capital Boulevard in Raleigh, North Carolina. The purpose of this shopping excursion was to purchase a replacement water filter cartridge for a water filtration unit that had been purchased at the Lowe's Home Improvement Warehouse previously. The Plaintiff was accompanied on this trip by his sixteen year old son who decided to remain in the car since the Plaintiff was to pick up one item quickly and return home. The specific item in question was a Teledyne cartridge filter with Lowe's Item # 25694 with a purchase price of $5.96. The Plaintiff left his son in the car, telling him that he would be back in less than

five minutes; then he rushed into the retail outlet. The Plaintiff went in the retail establishment with the clear intent of purchasing merchandise which the mercantile establishment offered for sale. At the time, the Plaintiff entered the mercantile establishment known in this action as Lowe's Home Improvement Warehouse. The Plaintiff had ample financial resources on him to purchase the item of intent. At the time the Plaintiff entered the establishment operated by the defendant, he had the following assets on his person: $2,500 cash (U.S. Currency), credit cards with purchasing power of $30,000.00, and a credit card issued by the defendant (Lowe's Company Credit) in the amount of $4,000. Hence, the Plaintiff entered the establishment with purchasing power of $36,500. After entering the establishment and locating Lowe's item # 25694 Teledyne cartridge, the Plaintiff proceeded towards the checkout area. However, on the way to the front of the store the Plaintiff noticed that the establishment was having a clearance on computers and related items. Noting what appeared to be a number of good buys, the Plaintiff begin picking up and examining items for purchase and soon had more items than he could carry in his hands. At this point, the Plaintiff realized that he needed a shopping cart or some way to carry the numerous items that he had planned to purchase. The Plaintiff saw an unattended shopping cart in the middle of an isle with trash in the bottom which consisted of paper and cardboard fragments and flatten boxes. Since no other customer claimed the cart and there were no objections from store personnel, the Plaintiff decided to use this unclaimed shopping cart to carry his unplanned purchases to the checkout. Many of the items under scrutiny did not have prices posted. A Lowe's employee, after doing several price checks, helped me load several of the bulkier items into the cart. Having second thoughts, the Plaintiff decided not to purchase the larger more expensive items, but

did keep a dozen or so smaller items. The Plaintiff proceeded to the checkout area with the merchandise he had planned to purchase. After arriving at the checkout counter, the Plaintiff placed each item on the counter. The items where checked and bagged by the clerk. After receiving payment, the clerk put the transparent bags into the same cart that I had used to bring the items to the checkout. The Plaintiff was given a receipt and proceeded to push the shopping cart through the exit uneventfully. After leaving the store and while in the parking lot, the Plaintiff was approached by a Lowe's employee who was identified as "Gene Blount". This person who henceforth in this action shall be called Lowe's Theft Prevention Officer, savagely and rudely approached the Plaintiff and accused the Plaintiff of **SHOPLIFTING.** Outside of the store in the parking lot, Lowe's Theft Prevention Officer began tearing through the Plaintiff's shopping cart like a demon possessed maniac. He performed a strip search of parcels and the shopping cart, throwing trash out of the cart and going through each bag demanding to see my receipt. This indignity caught the Plaintiff completely off guard, in that the Plaintiff had not stolen nor conspired to steal any item or items from Lowe's Home Improvement Warehouse. The Plaintiff has no criminal background and is not a thief! This entire episode took place in an open parking lot with dozens of people viewing. The event unfolded with such speed and brutality that it took the plaintiff several minutes to get his bearing in this situations; after which the Plaintiff behaved as any totally innocent victim would have under similar circumstances. The Plaintiff, who is normally a pacifist, became extremely angry and released a barrage of verbal expletives which drove his assailant, Lowe's Theft Prevention Officer, back into the establishment from whence he had come. The Plaintiff followed the Lowe's Theft Prevention Officer in hot pursuit back inside of the

establishment to make an inquiry. The defendant's employee had not given me his name. This information was obtained from the store personnel after the Plaintiff returned inside of the store to express his indignation at being publicly humiliated, defamed, and dehumanized. A young African American male Lowe's employee who had witnessed this atrocity and wished to remain anonymous for fear of loss of employment, said: "man they dissed(disrespected) you, they gave you nigger treatment, but, I need this job." Upon returning to the Plaintiff's car, the Plaintiff's son inquired as to why the Plaintiff was so upset and why had it taken so long? An explanation was given to my son who became upset and saddened. The Plaintiff returned home with elevated blood pressure suffering with chest and epigastric pain. The Plaintiff related this incident to friends and family who were in shock and incredulity.

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FIRST COUNT

6. The Plaintiff as a result of the acts of the Defendant has been the victim of racial discrimination and violation of civil rights. The Defendant used Race as a basis for its illegal search

and seizure. There was not probable cause in the action taken against the Plaintiff except the use of Race or **"Black Codes"**. The Plaintiff argues on Factual issues because a reasonable jury would find that the defendant had no probable cause to believe that the Plaintiff was a thief or a shoplifter. The plaintiff was singled out because of his race. The Plaintiff met all reasonable requirements for reasonable behavior, in that he paid for all mechandise before exiting, had material bagged, and got a receipt. White customers could be seen existing the establishment with merchandised unbagged, and without visible receipts where not detained and searched. This dual standard represents a violation of the Plaintiff's civil rights as prescribed by Federal Law. The Defendant was practicing "mercantile racism".

SECOND COUNT

7. The Plaintiff was subjected to wrongful detention and false imprisonment. The Defendant sought unlawful restraint of the Plaintiff's physical and psychological liberty without probable cause. A reasonable injury would find that the Defendant had no probable cause for detention. An over zealous racially motivated Theft Prevention Officer can not deprive an innocent citizen of his constitutional liberties.

THIRD COUNT

8. Defamation, defamation per se, slander, and libel were suffered by the Plaintiff as a result of the public humiliation inflected by the Defendant. The Defendant made the Plaintiff into a public spectacle and object of shame and ridicule. The acts by the Defendant were injurious to the Plaintiff's (victim) reputation and disgraced him. There was no basis in truth or

fact for said acts by the defendant, hence no probable cause for this malicious racist act.

FOURTH COUNT

9. Corporate Mal Practice resulted when the Defendant did not follow the "standard of care" and made an incorrect diagnosis when it labeled the Plaintiff as a thief or shoplifter. The Defendant used subjective bias criterion which resulted in an incorrect conclusion. This incorrect diagnosis resulted in harm to the Plaintiff both physically and mentally.

FIFTH COUNT

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WHEREFORE, Plaintiff demands judgement against Defendant, for:

A. The Plaintiff demands a written apology for his indignity and humiliation and that should similiar

events occur in the further that the Defendant will "at least" have the courtesy to apologize.

B. The sum of $1,000,000.00 for compensatory damages

C. The sum of $25,000,000.00 for punitive damages

D. For such cost and further relief as the court may deem

By s/ Larry Barnes
Larry Barnes, Sr., MD Pro Se
2920 Legging Lane
Raleigh, North Carolina 27615
(919) 676-8205

CERTIFICATION

The undersigned hereby certifies that the matter in controversy in not the subject of any other action pending in any court. The undersigned further certifies that to my knowledge there are no other parties joined in this action at this time but reserves the right to allow the ACLU or any similar interested party to join if deemed appropriate.

I hereby certify that the foregoing statements made by me are true.

Dated: 1/3/97

s/ Larry Barnes
Larry Barnes

3

FILED
MAR 1 / 19-)
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-1225

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

LARRY BARNES, SR., M.D.
Petitioner

vs

LOWE'S COMPANIES, INC.
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

LARRY BARNES, SR., M.D.
PETITIONER, PRO SE
PO BOX 12085
RALEIGH, NORTH CAROLINA 27605
(919) 781-7072

17 PP

QUESTIONS PRESENTED

1. Whether it is unconstitutional for a retail merchant engaged in multi-state public commerce to use racial profiling as a criterion for theft prevention?

2. Whether racial profiling by a retail merchant engaged in multi-state public commerce constitutes ex ante racial discrimination and is this a form of discrimination?

3. Whether a retail merchant engaged in multi-state public commerce enjoys absolute immunity from civil action under Title II of the Civil Rights Act of 1964?

4. Does the racial profiling of African Americans by a retail merchant constitute "badges and incidents of slavery" proposed by the United States Supreme Court decision in *Jones v. Mayer?* Does the racial profiling constitute intentional discrimination?

5. Whether a District Court Judge may use his broad discretion to dismiss a case before the facts of the case are determined when those facts determine federal jurisdiction?

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Omi, M., Winant, H. Racial Formation in the United States: From the 1960s to the 1980s. New York: Routledge, (1986/1989)

Gilen, Martin. "Race and Poverty in America: Public Miscon ceptions and the American News Media." Public Policy Quarterly, (vol. 6, 1996).

Bloom, R.M., Brodin, M.S. Constitutional Criminal Procedure:Examples and Explanations. (1992)

STATEMENT OF THE CASE

A. Factual Allegations of Complaint

The respondent's Brief in Opposition is filled with inaccurate statement and fabrications. In the brief the Respondent recites and argues references that are grossly inaccurate. The Respondent having based it case on Hearsay Evidence. The defense has had to speculate and fabricate its facts in order to create a defensible case. The Respondent has produced no witnesses willing to swear to their allegations under oath. Hence, the Respondent relies exclusively on legal thaumaturgy to create a generic case which is defensible. The Petitioner as the only eyewitness provides the "best" evidence in the instant case.

The Petitioner claims a gross inaccuracy in the Respondent's Brief in Opposition on page 3 paragraph 3 in which they make the statement:

> "In the Complaint, Petitioner alleges that as he was leaving the store, he was approached by a Lowe's Theft Prevention Officer named Gene Blount."

The above statement is **totally inaccurate**, however it serves as the basis for the Respondents Defense. The District Court erroneously accepted the above Respondent's version as fact without confirmation. **The incident above occurred in the Parking lot, <u>not</u> as the Petitioner " was leaving the store"**.
There is no place in any Complaint or Pleading in which the Petitioner uses the term, "as he left the store". The phrase, "as he left the store" is the progeny of the Respondent's Defense. None of the Respondent's witnesses could swear to this statement without committing **perjury**, hence the Respondent does not have any witnesses to substantiate their defense. The truthful facts of the case are as stated by the Petitioner in his Complaint, "**After leaving the store and while in the parking lot, the Plaintiff was approached by a Lowe's Theft Preven-**

tion Officer who was identified as "Gene Blunt" (See Brief in Opposition, Appendix A, page 4a).

The Petitioner swore to his eyewitness account of the incident under oath and penalty of perjury. The Respondent was unable to get any witness to make a statement under oath to refute assertions of the Petitioner. In spite of the overwhelming evidence in favor of the Petitioner's account. The District Court used its "board discretion" to dismiss the case within 48 hours after the Petitioner served his first set of Interrogatories on Respondent, no Discovery was allowed. The District Court arbitrarily accepted the Respondent's version of the events, even thought the Respondent's Defense could not permit a single witness to verify their account of events. The Petitioner assumed that the actions of District Court may have represented vestige antebellum legal reasoning or a level of Constitutional reasoning beyond the comprehension the Petitioner's.

The Respondent further claims that, "There are no allegations that Gene Blount attempted to detain Petitioner, ."
This statement is counter intuitive! How could a Theft Prevention Officer chase a suspect (Petitioner) pushing a shopping cart full of merchandise, stop him, accuse him of sholifting, perform a full humiliating search in the parking lot, and **not** have detained the Petitioner (suspect). (See Petitioner's Appendix A,B,C and D).

The Respondent further states, "while he was in the store, an African American employee told the Petitioner that he had been given "nigger treatment." This scenario again was created by the Respondent to distort the true facts. The Petitioner has never stated the above incident with a Lowe's employee occurred inside the store. No such event occurred inside of the store, this encounter in which an African American Lowe's employee commented that the Petitioner had received "nigger treatment" occurred in the parking lot. Since the event occurred in the parking lot, it would have been impossible for anyone

inside of the store to have seen or heard the details of this incident.

The Respondent systematically has distorted the facts of this case in order present its case in the best light of the Court.

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, the Petitioner submits a Reply Brief to Respondent's Brief in Opposition.

REASONS TO GRANT WRIT

BEFORE A REPLY TO THE RESPONDENT'S REQUEST FOR DENIAL OF THE WRIT CERTIORARI, THE PETITIONER WOULD LIKE TO POINT OUT A VERY SERIOUS ERROR ON PAGE 5 PARAGRAPH 1 OF THE RESPONDENT'S BRIEF IN OPPOSITION. THE RESPONDENT INCORRECTLY QUOTES SUPREME COURT RULE 7 AS THE RULE GOVERNING REVIEW ON CERTIORARI. THEIR OPENING SENTENCE STATES, "REVIEW ON A WRIT OF CERTIORARI IS NOT A MATTER OF RIGHT BUT OF JUDICAL DISCRESTION, AND A PETITION WILL BE GRANTED ONLY FOR COMPELLING REASONS," IS NOT FOUND IN THE TEXT OF SUPREME COURT RULE 7. SUPREME COURT RULE 7 IS TITLED "PROHIBITION AGAINST PRACTICE." SUPREME COURT RULE 10 (JAN. 1, 1990) READS "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI." IT IS SUPREME COURT RULE 10, NOT RULE 7 WHICH DEFINES CERTIORARI.

Pursuant Supreme Court Rule 10, "Review on writ of certiorari is not a matter of right, but of judicial discretion." "A petition for writ will be granted only for compelling reasons." The jurisdiction to review judgements and decrees by certiorari is to be exercised sparingly only in cases of real and general importance. *State of Ohio ex rel. Seney V. Swift Co.*, 260 U.S. 140 (1922).

The Court should not grant certiorari merely to achieve justice in a particular case. Moreover, the Court should grant certiorari in the interest of the public, not merely for the interest of the parties. *Maryland v. Baltimore Radio show*, 338 U.S.

912, 70 S.Ct 252, 94 L.Ed. 562 (1950). *Ticor Title Insurance Co. v. Brown* 114 S.Ct. 1359, 1362, 128 L.Ed.2d 33 (1994).

In the instant case, the Petition for Writ of Certiorari satisfies the criteria for review by the Court. The issue of racial profiling, consumer or mercantile racism is a compelling issue and an issue of great public importance. It is not only a form of intentional racial discrimination against African Americans, but a threat to the individual civil liberties of all Americans. Racial profiling has become epidemic and poses a threat to American Democracy. The issue of "racial profiling" has become so uncontrolled that several states including Maryland, New Jersey, Pennsylvania and North Carolina have taken action specifically to curtail such actions. While there has been state action to curtail racial profiling, private interests have resisted efforts to abolish this practice.

Intentional racial discrimination, inherent in racial profiling is proliferating in the private sector due to inaction by the courts. The Federal Courts seem dumbfounded with the issues of the intent and effect of racial profiling, consumer or mercantile racism. The lack of a judicial history and precedent has lead to the wholesale dismissal of many valid claims. The dynamics of the legal and sociological constructs associated with this phenomena present a nebulous legal perplexity which by default are considered invalid federal claim. Racial profiling does not represent some "new cause of action" rather de facto residua of "badges and incidents" of slavery defined by *Jones v. Mayer,* private and intentional racial discrimination. *Jones v. Alfred Mayer Co.,* 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed 1189 (1950). Racial profiling is a modern form of Jim Crow practice which have been ruled unconstitutional repeatedly by the Court, hence the Court already has the authority to address private racial profiling. The Federal Judiciary must extricate itself from the Brown v. Board of Education genre and accept cases which are more in line with the social evolution. *Brown v. Board of Education* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). While the Court has address the fundamental issues in the past, the contemporary question is not if African Americans can enter the

front door of a restaurant, but how will they be treated once inside. It is these issues of social and legal evolution which the instant case addresses. Racial profiling is a substantial Federal Question.

In words of Chief Justice William Rehnquist:

> "It would be a mistake to think that just because a certain kind of judicial business has always been conducted in a particular way in the past, it therefore ought to be conducted that way in the future. The federal courts, like other government institutions, must, where necessary, change with the times".
>
> "Change is the law of life, and the judiciary will have to change to meet the challenges which it will face in the future."

With respect to the instant case the future is now. An old cause of action, equal treatment for African Americans, has undergone a metamorphosis and re-emerged as racial profiling. The Court has a moral and legal obligation to address this issue.

Racial profiling constitutes an intentional form of discrimination. The Court has always found intentional discrimination to be unconstitutional. Intentional discrimination is only allowed by a "compelling state interest." Chief Justice Burger, asserted, "no discriminator has ever satisfied this seemingly insurmountable standard." *Dunn v. Blumstein,* 40 U.S. 330, 363-64 (C.J. Burger, dissenting). Since racial profiling does not meet this insurmountable standard, both private and state racial profiling must be unconstitutional.

However, in two exceptional instances the Court has held that intentional discrimination as Constitutional. The Supreme Court upheld discrimination against Japanese Americans during World War II in the context of national security, "gravest, imminent danger to the public safety" and "conditions of great emergency." *Korematsu v. United States*, 323 U.S. 214, 218

(1944). *Hirabayashi v. United States*, 320 U.S. 81 Ill (1943). The government later compensated the victims of these rulings. The African American Community does not now, nor have they ever posed a threat to the nation's "security" and "public safety." Therefore, there exists no Constitutional basis for intentional discrimination caused by racial profiling.

Finally, the Petitioner urges the Court to do that which it is Constitutionally mandated to do, rule on the issue of racial profiling in the instant case. The complaint is a cognizable claim for relief and there are compelling circumstances in the nation's interest warranting the granting of a writ, in this case.

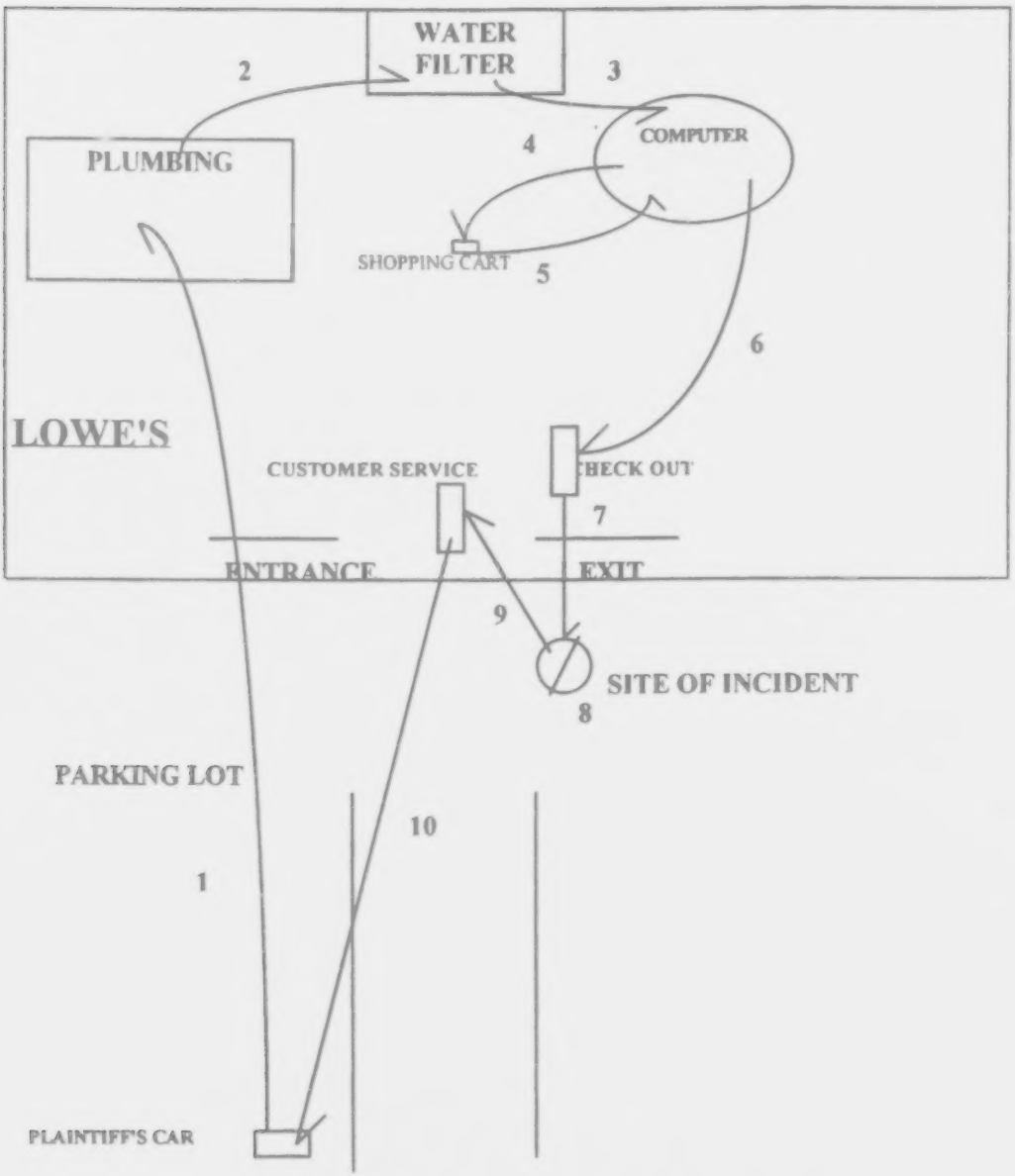
CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

Larry Barnes, Pro se
PO Box 12085
Raleigh, North Carolina 27605
(919) 781-7072

ORDER OF EVENTS **CASE NO.5:97-CV-1040-B02**



I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. /s/Larry Barnes,Sr

EXHIBIT #1 DATE 3/28/98 SIGN _____

APPENDIX A

CASE NO . 5:97-CV-1040-B02

L O W E ' S

CLERK # 3684 12-30-95

73073	CURTIS MULTI-MEDIA	10.04
	4 @ 2.51	
72457	S.CORONA TYPWRITER	4.31
72457	S.CORONA TYPWRITER	4.31
72457	S.CORONA TYPWRITER	4.31
25694	TELEDYNE CARTRIDGE	5.96
91095	TI 8DIG HANDHELD C	2.65
79366	S.CORONA LIFTOFF C	.73
79366	S.CORONA LIFTOFF C	.73
79366	S.CORONA LIFTOFF C	.73
79366	S.CORONA LIFTOFF C	.73
79366	S.CORONA LIFTOFF C	.73
79366	S.CORONA LIFTOFF C	.73
	SUBTOTAL	35.96
	TAX 38064	2.16
	TOTAL	38.12
	CASH TENDER	40.00
	CHANGE	1.88

THANK YOU FOR SHOPPING LOWE'S

0444 10 12/30/95 16:50 NO. 829

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. /s/Larry Barnes,Sr

EXHIBIT #1 DATE 3/28/98 SIGN _____

APPENDIX B

CASE NO . 5:97-CV-1040-B02

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. /s/Larry Barnes,Sr
EXHIBIT #1 DATE 3/29/95 SIGN _____

APPENDIX C

Case No. 5:97-CV-1040-B02

DECLARATION OF KENNETH ISOM BARNES

I, Kenneth Isom Barnes, declare under penalty of perjury:

1. I am the son of Larry Barnes, Sr., who is the plaintiff in the above cited case of Barnes v. Lowe's (case no. 5:97-CV-1040-B02) pending in the United States District Court for The Eastern District of North Carolina (Western Division).

2. On December 30, 1995 while driving, my father decided to stop at Lowe's on Capital Boulevard in Raleigh, North Carolina.

3. I did not want my father to stop because I was tired and getting sleepy.

4. I just wanted to go home.

5. My father said that he would be "quick" .

6. He said he needed to buy only one thing and would be back in five minutes.

7. Since I was tired, I stayed in the car and reclined the seat.

8. My father took longer than expected.

9. I was getting irritated.

10. For awhile, I considered entering the store to look for him.

11. But, I decided to wait a little longer.

12. Finally, my father came back to the car.

13. I asked, "what took such a long time"?

14. However, before I finished my statement, I could tell as he got into the car that he was very upset!

15. He was very happy when he left the car to go into Lowe's, but he was very upset when he came back.

16. I asked him, " what's wrong dad?"

17. At first, he did not say anything,sort of mumbling to himself, frowning.

18. Then he told me what had happened.

19. He said the he had been stopped in the parking lot, had his bags searched,and accused of shoplifting because he is Black.

20. He sat in the car for a while watching the front exit of Lowe's, he was becoming even more angry.

21. I said " let's go home," I became very frighten and unsettled

22. He said, "not yet , I am going to see if they stop any White people in the parking lot and accuse them of shop lifting!"

23. We sat in the parking lot watching people existing the store.

24. He said he was watching to see if they stopped any White people in the parking lot to check their receipts.

25.I wanted my father and me to leave the area immediately.

26. He said, "wait, I need to check on something", then he got out of the car and headed towards the store.

27. At this time reality had become a nightmare.

28. He returned to the car more upset then when he left.

29. He said, "I am going to write the president of Lowe's and make a complaint".

30. We left Lowe's parking lot and returned home.

31. At home he related the incident to my mother.

32. I can say honestly under penalty of perjury, that this

incidental truly ruined my father's life, he has talked about it almost every for the last two years

33. After Lowe's wrote him back and said that he got the right kind treatment , he seems to be getting angrier each day.

34. He appears to be obsessed with this injustice.

35. This incident has affected every member of my family.

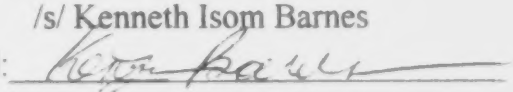
36. As a junior in high school at that time, this incidence caused me to experience emotions that I hope that I will never experience again.

37. I am now a hardworking freshman at Duke University, I gave my life to Christ at 5 years of age, and I have never been in trouble. I pray that I can go far in life. I pray that the injustice which that my Father is experiencing will come to an end for Black people.

I declare under penalty of perjury that the foregoing is true and correct.

Date: March 24, 1998

/s/ Kenneth Isom Barnes

Signed: 

Kenneth Isom Barnes